

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

PHILLIP P COMBS; JAMIE COMBS,

Plaintiff,

v.

NATIONWIDE INSURANCE COMPANY  
OF AMERICA,

Defendant.

Case No. 3:22-cv-05684-TMC

ORDER DENYING DEFENDANT’S  
MOTION TO EXCLUDE

Before the Court is Defendant Nationwide Insurance Company of America’s (“Nationwide’s”) motion to exclude evidence. Dkt. 15. For the reasons explained below, the Court DENIES Nationwide’s motion.

**I. BACKGROUND**

In July 2020, a storm damaged the roof of a home in Lakewood, Washington owned by Plaintiffs Phillip and Jamie Combs.<sup>1</sup> Dkt. 1-2 at 2. The Combses submitted a claim under a homeowners’ insurance policy issued by Nationwide. *Id.* They filed this case in Pierce County Superior Court in August 2022, alleging Nationwide breached the insurance policy and acted in

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<sup>1</sup> To avoid confusion, where necessary the Court will refer to Phillip and Jamie Combs by their first names.

1 bad faith while processing their claim. Dkt. 1-2 at 3–10. Nationwide removed the case to this  
2 Court based on diversity jurisdiction. Dkt. 1 at 2; 28 U.S.C. §§ 1332(a), 1441.

3 On November 14, 2022, the Combses served Nationwide with their initial disclosures  
4 required by Federal Rule of Civil Procedure 26(a)(1)(A). The “computation of damages” section  
5 listed only categories of damages, rather than amounts, but said the Combses would supplement.  
6 Dkt. 16-1 at 3. The description of two categories (fire loss and rental income) later proved to be  
7 incorrect. A few weeks later, on December 6, 2022, the Combses supplemented their disclosures,  
8 removing the incorrect categories and writing: “Thus far . . . compensatory damages in the  
9 amount of \$119,100.00 are known.” Dkt. 16-3. The disclosure referenced two repair estimates  
10 from Sam’s Roofing with amounts of \$98,000 and \$21,100 (which add up to the compensatory  
11 damages estimate of \$119,100). *Id.* On February 1, 2023 the Combses provided interrogatory  
12 answers describing temporary repairs they had performed to the house, including that “last  
13 summer, Plaintiff hired a roofer to replace portions of the damaged roof . . . .” Dkt. 16-4 at 3.  
14 They produced a quote from Wilderness Roofing & Exteriors, LLC that showed a total amount  
15 of \$77,330.00 and was signed with Phillip’s initials, “PC.” *Id.* at 5; Dkt. 18-1.

16 In Jamie’s deposition on July 18, 2023, she testified she could not recall the “exact  
17 number” for replacing the roof but “want[ed] to say \$75,000.” Dkt. 16-6 at 4. Jamie testified that  
18 she and her husband would provide any invoices they had for the repair. *Id.* at 5. Jamie and  
19 Phillip both confirmed that two categories of damages listed in the November 2022 initial  
20 disclosures, fire loss and rental income, were incorrect. *Id.* at 7; 16-7 at 4. In Phillip’s deposition  
21 on July 20, 2023, when questioned about the quote from Wilderness Roofing and whether there  
22 had been a final invoice, Phillip testified: “I don’t know that we’ve even received an invoice. I  
23 think we may have paid off from the quote, but if – I’ll – I’ll look back, and if we have it, I’ll  
24 provide it.” Dkt. 16-7 at 9.

1 At no point did Nationwide file a motion to compel. Instead, on August 8, 2023, with  
2 over a month remaining in discovery, Nationwide filed this motion seeking to prohibit the  
3 Combses from producing any further evidence to support their damages computation as a  
4 discovery sanction under Federal Rule of Civil Procedure 37. Dkt. 15.

5 The discovery cutoff when Nationwide filed its motion was September 15, 2023. At both  
6 parties' request, the Court later extended the cutoff to September 29, 2023. Dkts. 24, 25. The  
7 Court also allowed the parties to schedule an additional deposition for after the discovery cutoff.  
8 Dkt. 27.

## 9 II. DISCUSSION

### 10 A. Legal Standard

11 Federal Rule of Civil Procedure 26(a)(1)(A)(iii) requires a party to provide “a  
12 computation of each category of damages claimed by the disclosing party—who must also make  
13 available for inspection and copying ... the documents or other evidentiary material, unless  
14 privileged or protected from disclosure, on which each computation is based, including materials  
15 bearing on the nature and extent of injuries suffered.” Fed. R. Civ. P. 26(a)(1)(A)(iii). The rule  
16 does not clarify the level of specificity required in the computation of damages. According to the  
17 advisory committee notes, the purpose of the rule is to “‘accelerate the exchange of basic  
18 information’ that is ‘needed in most cases to prepare for trial or make an informed decision about  
19 settlement.’” *City and County of San Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 221  
20 (N.D. Cal. 2003) (quoting Fed. R. Civ. P. 26(a) advisory committee’s note (1993)). “[E]arly  
21 disclosure also functions to assist the parties in focusing and prioritizing their organization of  
22 discovery.” *Id.* “Given these purposes, the plaintiff should provide more than a lump sum  
23 statement of the damages allegedly sustained.” *Id.* The computation of damages “contemplates  
24

1 some analysis; for instance, in a claim for lost wages, there should be some information relating  
2 to hours worked and pay rate.” *Id.* (citing cases).

3 Rule 37 provides that “[i]f a party fails to provide information or identify a witness as  
4 required by Rule 26(a) or (e), the party is not allowed to use that information or witness to  
5 supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially  
6 justified or is harmless.” Fed. R. Civ. P. 37(c)(1). “Under Rule 37, exclusion of evidence not  
7 disclosed is appropriate unless the failure to disclose was substantially justified or harmless.”  
8 *Hoffman v. Construction Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) (citing *Yeti*  
9 *by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)).

10 **B. The Combses’ supplemental disclosures complied with Rule 26 and any delay**  
11 **was harmless.**

12 The Court agrees with Nationwide that the Combses’ November 2022 initial  
13 disclosures—which provided only categories of damages, with no amount or method of  
14 computation, two of which were in error—did not comply with Rule 26. But within a few weeks,  
15 the Combses supplemented their disclosures, withdrew the incorrect categories, estimated  
16 compensatory damages of \$119,100.00, and referenced two simple one-page repair estimates  
17 adding up to that amount. Dkt. 16-3; *compare Weinstein & Riley, PS v. Westport Ins. Co.*, No. C-  
18 08-1694-JLR, 2009 WL 10676389, at \*2 (W.D. Wash. Nov. 4, 2009) (finding party failed to  
19 comply with Rule 26 where it simply referenced the entire voluminous litigation file). A few  
20 months later, the Combses provided another quote from the roofer whom they had paid out of  
21 pocket, Dkt. 18-1, and in their depositions, they testified that the amount they paid was  
22 consistent with that quote and pledged to produce any additional documentation they could find,  
23 Dkt. 16-6, 16-7. When Nationwide filed this motion, over a month remained in discovery, which  
24 was later extended.

1           Nationwide’s arguments—that the Combses “have failed to provide evidence in support  
2 of their claim for damages” and “provided no additional documentary evidence” in support of  
3 their supplemented disclosures, Dkt. 15 at 1, 3—thus overstate the record. Nationwide’s reply  
4 brief is more accurate when it contends that because the Wilderness Roofing repairs were done  
5 in August 2022, the Combses should have produced that quote with their November or  
6 December 2022 initial disclosures, rather than their February 2023 discovery responses. Dkt. 20  
7 at 4. But the Court finds this delay of 2–3 months was harmless, given that in February 2023  
8 over six months of discovery remained.

9           In the context of a simple insurance dispute over the repair or replacement of a roof, the  
10 roofing estimates supplied by the Combses with their December 2022 disclosures were sufficient  
11 to comply with Rule 26’s purpose of providing “basic information” and “some analysis” about  
12 their computation of damages. *See Tutor-Saliba Corp.*, 218 F.R.D. at 221. Those estimates and  
13 the quote produced in February 2023 were also sufficient to assist Nationwide “in focusing and  
14 prioritizing [its] organization of discovery.” *Id.* The Combses’ delay in producing the additional  
15 quote related to out-of-pocket repairs does not warrant the preemptive exclusion of any  
16 additional evidence related to damages disclosed in the final months of discovery. *See Weinstein*  
17 *& Riley, PS*, 2009 WL 10676389, at \*2 (finding incomplete disclosure harmless with months  
18 remaining in discovery and noting that exclusionary sanctions are usually reserved for when “the  
19 plaintiffs failed to disclose damages until the eve of trial”) (citing cases).

20           **C.     The Court declines Nationwide’s request for supplemental briefing.**

21           On October 5, 2023, Nationwide filed a praecipe seeking to submit supplemental briefing  
22 and exhibits in support of this motion. Dkt. 28. In that briefing, Nationwide requests the Court  
23 exclude any evidence regarding repair estimates provided by the Combses in the final month of  
24 discovery. Dkt. 28-1. This request is not fairly encompassed by the present motion, because

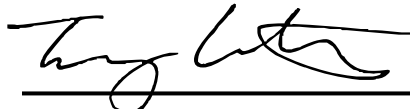
1 Nationwide has not demonstrated the new information *could* have been provided with initial  
2 disclosures earlier in the case. To the contrary, at least one of the new estimates disclosed on  
3 September 12, 2023 is dated September 5, 2023—one week before the supplemental disclosure.  
4 Dkt. 28-2 at 8. If Nationwide needs more time to address new facts that have developed near the  
5 end of discovery, Nationwide can seek an extension. Nationwide also remains free to argue in  
6 dispositive motions or at trial about the sufficiency of evidence in support of the Combses’  
7 damages claims, or to file motions *in limine* prior to trial if it seeks to exclude certain pieces of  
8 evidence it contends were untimely. But because the arguments made in its supplemental brief  
9 do not go to a violation of initial disclosures, the Court declines to consider them.

### 10 III. CONCLUSION

11 For the foregoing reasons, the Court DENIES Nationwide’s motion to exclude (Dkt. 15).  
12 The Court also DENIES the request to strike contained in Nationwide’s reply brief and DENIES  
13 Nationwide’s request (Dkt. 28) for supplemental briefing to exclude additional evidence.

14 Consistent with the undersigned’s typical case management procedures, if additional  
15 discovery disputes arise in this case, the Court directs the parties to file a joint summary of the  
16 dispute that is no more than three pages and then contact the courtroom deputy to schedule a  
17 telephone conference with the Court. *See* Fed. R. Civ. P. 16(b)(3)(B)(v).

18  
19 Dated this 5th day of October, 2023.

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22 Tiffany M. Cartwright  
23 United States District Court Judge  
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